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The Corporate Transparency Act: A Proposal to Expand Beneficial Ownership Reporting for Legal Entities, Corporate Formation Agents and – Potentially – Attorneys

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In late June, Representatives Carolyn Maloney and Peter King of New York introduced The Corporate Transparency Act of 2017 (the "Act"). In August, Senators Ron Wyden and Marco Rubio introduced companion legislation in the Senate. A Fact Sheet issued by Senator Wyden is here. Representative King previously has introduced several versions of this proposed bipartisan legislation; the most recent earlier version, entitled the Incorporation Transparency and Law Enforcement Assistance Act, was introduced in February 2016. Although it is far from clear that this latest version will be passed, the Act is worthy of attention and discussion because it represents a potentially significant expansion of the Bank Secrecy Act ("BSA") to a whole new category of businesses.

The Act is relatively complex. In part, it would amend the BSA in order to compel the Secretary of the Treasury to issue regulations that would require corporations and limited liability companies ("LLCs") formed in States which lack a formation system requiring robust identification of beneficial ownership (as defined in the Act) to themselves file reports to the Financial Crimes Enforcement Network ("FinCEN") that provide the same information about beneficial ownership that the entities would have to provide, *if* they were in a State with a sufficiently robust formation system. More colloquially, entities formed in States which don't require much information about beneficial ownership now would have to report that information directly to FinCEN – scrutiny which presumably is designed to both motivate States to enact more demanding formation systems, and demotivate persons from forming entities in States which require little information about beneficial ownership.

However, there is another facet to the Act which to date has not seemed to garner much attention, but which potentially could have a significant impact. Under the Act, formation agents – i.e., those who assist in the creation of legal entities such as corporations or LLCs – would be swept up in the BSA's definition of a "financial institution" and therefore subject to the BSA's AML and reporting obligations. This expanded definition potentially applies to a broad swath of businesses and individuals previously not regulated directly by the BSA, including certain attorneys.

Clearly attempting to gain steam from last year's Panama Papers scandal – although the Act's various predecessor bills were introduced before that scandal erupted – the "Findings" section of the Act lays out the case for its passage. According to that section, the Act is necessary because:

- Few States obtain meaningful information about the beneficial owners of entities formed under their laws, and often require less information than is needed to obtain a bank account or driver's license;
- Many States have automated procedures which allow the formation of a new entity within 24 hours of the filing of an online application;
- Some Internet Web sites highlight the anonymity provided by certain State incorporation practices as a reason to incorporate in those States, along with offshore jurisdictions;
- Criminals have exploited these weaknesses to conceal their identities and use newly formed entities to promote terrorism, drug trafficking, money laundering, tax evasion, securities fraud, and foreign corruption;
- The lack of beneficial ownership information has stymied law enforcement;
- The Financial Action Task Force ("FATF"), described as "a leading international anti-money laundering organization," has criticized the U.S. for failing to obtain timely access to adequate, accurate and current ownership information;
- In contrast to the U.S., every country in the European Union requires formation agents to identify the beneficial owners of the corporations formed in those countries.

In the media, the backers of the Act have latched onto another argument to advocate for its passage: national security. They say that the Act will assist in battling terrorist financing and unseemly conduct such as the alleged interference by Russia in the 2016 U.S. election for President. In the press releaseaccompanying the proposed House legislation, Representative King catalogued the various anti-corruption/transparency groups which are backing the bill, such as Global Witness. Although the support of such groups is not surprising, the press release also highlights the support of a prominent banking industry group, The Clearing House Association (whose President, Greg Baer, has appeared as a guest blogger here on the topic of reforming the current AML regulatory regime).

If passed, the Act would represent another chapter in the domestic and global campaign to increase transparency in financial transactions through information gathering by private parties and expanded requirements for AML-related reporting. As we have blogged, this ongoing campaign has included FinCEN creating reporting requirements for title insurance companies involved in cash purchases of high-end real estate; FinCEN issuing regulations which require covered financial institutions to identify the beneficial ownership of new accounts opened by legal entity customers; Congress recently introducing the Combatting Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017, which in part seeks to expand cross-border reporting requirements under the BSA; and the FATF issuing in December 2016 its *Mutual Evaluation Report on the Unites States' Measures to Combat Money Laundering and Terrorist Financing*, which (again) found that that a continued lack of timely access to adequate, accurate, and current information on the beneficial owners of entities represented a "fundamental gap" in the U.S. AML regulatory regime. As suggested by its Findings section, the Act also would represent a partial response by the U.S. Congress to international critiques, such as those posed by the FATF and the European Parliament, that the United States has become a haven for suspected money launderers and tax evaders and is lagging behind other nations in AML compliance.

In our next post, we will describe the proposed Act's details and its potential implications for a new category of defined "financial institution" – formation agents, which might include attorneys.

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